Honorable Judge John C. Coughenour

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WASHINGTON

AT SEATTLE

CHONG and MARILYN YIM, KELLY LYLES, EILEEN, LLC, and RENTAL HOUSING ASSOCIATION OF WASHINGTON, Plaintiffs, v. THE CITY OF SEATTLE, a Washington Municipal corporation, Defendant.	Civil Action No. 2:18-cv-00736-JCC **PLAINTIFFS' OPPOSITION TO CITY'S MOTION TO CERTIFY A QUESTION TO THE WASHINGTON SUPREME COURT** **Noted on Motion Calendar Feb. 1, 2019**

INTRODUCTION

The City of Seattle's Motion to Certify a Question to the Washington Supreme Court fails to satisfy the most basic criteria for certification. Washington law on substantive due process in the context of real property is settled. *Laurel Park Community, LLC v. City of Tumwater*, 698 F.3d 1180, 1194-95 (9th Cir. 2012); *Abbey Road Group, LLC v. City of Bonney Lake*, 167 Wn.2d 242, 260 (2009). The City's desire to overturn a long line of Washington Supreme Court case law holding property regulations subject to the unduly oppressive test in *Yim v. City of Seattle* (*Yim I*) does not render Yim's due process claim unsettled—particularly where both this case and *Yim I* can be decided without reference to the due process claim. Certification is furthermore

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unwarranted because the City chose to remove this proceeding from state court, only to seek permission to return the case to the state courts after the parties fully briefed all dispositive issues. The City's request fails to satisfy the criteria for certification and would burden First Amendment rights through delay. The City's motion should be denied.

BACKGROUND

The Plaintiffs filed their federal and state constitutional claims in Washington state court on May 1, 2018. *See* Notice of removal from King County Superior Court, Dkt. Entry #1. The City opted to remove this case to federal court on May 21, 2018. *Id.* The parties agreed to a stipulated schedule for summary judgment briefing for dispositive resolution of all Plaintiffs' claims in federal court, and this Court granted the parties' joint motion establishing that schedule on July 20, 2018. *See* Minute Order, Dkt. Entry #10. The noting date for consideration of the parties' cross-motions for summary judgment was January 11, 2019. *Id.* Months after removing this case from state court, stipulating to dispositive motions, and after completing summary judgment briefing, the City suddenly requested that this Court shunt the case back into state court.

The City's basis for seeking certification is an appeal currently pending before the Washington Supreme Court—*Yim v. City of Seattle* (*Yim I*). In *Yim I*, a group of landlords (including Plaintiffs in this case) challenged the City's "first-in-time" rule (FIT) passed as part of Seattle's income-source discrimination ordinance. *See* Exhibit 1. FIT required landlords to rent to the first person to submit an application for a unit that satisfied the landlords' written rental criteria. *See* SMC § 14.08.050. The *Yim I* Plaintiffs raised four state constitutional claims: uncompensated taking, taking for private use, free speech, and substantive due process. *See id.*

On March 28, 2018, the King County Superior Court granted Plaintiffs' Motion for Summary Judgment on all four constitutional claims. *See id*. The City sought direct review of five issues from the Washington Supreme Court. *See* Exhibit 2. Among other things, the City asked the state supreme court to reconsider its due process case law—the same reconsideration the City hopes to achieve with its current Motion to this Court. The Washington Supreme Court granted

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the City's request on November 28, 2018, without limiting issues presented for review. *See* Exhibit 3. The Court has not yet set an oral argument date.

ARGUMENT

The City poses a question for certification that does not meet the key requirements for a certified question: the Court must have a need to ascertain state law to dispose of the case and the answer under state law must be uncertain. Here, Plaintiffs' claims can only be fully resolved by addressing federal law, and the state law issue has been clearly determined. Moreover, this Court should refrain from certification where the requesting party already removed the case from a state forum and where a First Amendment right is at issue.

I. This case can be resolved without reference to state law

This Court should not certify a question to the Washington Supreme Court because the question would not dispose of the proceeding. Under Washington law, state certification is only proper where "it is necessary to ascertain the local law of this state in order to dispose of [the federal court] proceeding." RCW § 2.60.020. In other words, the certified question must be "outcome determinative." *Bylsma v. Burger King Corp.*, 676 F.3d 779, 783 (9th Cir. 2012).

Here, however, the answer to the state law question will not dispose of this proceeding. Plaintiffs separately challenge two aspects of the City's criminal background check ban, under both the sate and federal constitutions: the inquiry prohibition and the use prohibition. The inquiry prohibition states that no one may require disclosure or inquire about a potential tenant's criminal history. SMC § 14.09.025(A)(2). The use prohibition states that landlords cannot use criminal history as a basis for taking an adverse action, such as denying someone tenancy, evicting someone, terminating a lease, and so on. *Id.*; *see also id.* at § 14.09.010. The state due process question the City seeks to certify only relates to the use prohibition, and then only to the state claim. Hence, the state law due process question touches on only one part of one claim.

Regardless of how Washington Supreme Court would address the state-law due process issue, this Court would still have to engage in the federal due-process analysis of the use

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prohibition and First Amendment analysis of the inquiry prohibition. The certified question proposed by the City would not resolve the dispute.

II. The state law relevant to this dispute is clearly determined

The state law question that the City asks this Court to certify has already been answered by the state supreme court and by the Ninth Circuit—the City just hopes the answer will change. State law says a certified question should be granted only if "the local law has not been clearly determined." RCW 2.60.020. State appellate rules pose the same requirement. *See* Washington Rule of Appellate Procedure 16.16.

A certified question of state law must "clarify an unsettled area of law." *Fidelitad, Inc. v. Insitu, Inc.*, 2016 WL 4265749, at *5 (E.D. Wa. Aug. 11, 2016). A question of state law is "clearly determined," even if the question is challenging: "[T]he mere difficulty in ascertaining local law is no excuse for remitting the parties to a state tribunal." *Lehman Brothers v. Schein*, 416 U.S. 386, 390 (1974). The requisite uncertainty typically arises where Washington courts have simply not addressed a question at all. *See, e.g.*, *Centurion Properties III. LLC v. Chicago Title Ins. Co.*, 793 F.3d 1087, 1090 (9th Cir. 2015) ("To date, no Washington case has addressed whether a title company owes a duty of care to third parties to refrain from negligently recording legal instruments."). At minimum, the procedure exists for a circumstance in which "there is no way to accurately predict how the Washington Supreme Court would decide this matter." *See id.* at 1091.

The City asks this Court to certify the question of whether the rational basis test or the "unduly oppressive" test should apply to Plaintiffs' state constitutional challenge to the use prohibition. That question is settled. For decades, courts applying the state due process guarantee in cases involving real property have used the unduly oppressive test. Not a single state supreme court case has challenged this long pedigree. The primary case that the City points to is *Amunrud v. Board of Appeals*—a case discussed extensively in the summary judgment briefing. 158 Wn.2d 208 (2006); *see* City's Opp. and XMSJ, Dkt. # 33 at 22, 24-26; Pl.'s Opp. & Reply, Dkt. #48 at 26. To paraphrase that discussion, *Amunrud* involved a claim that stripping someone of a commercial driver's license as a punishment for delinquent child support violated the right to earn

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a living—a non-enumerated, non-fundamental liberty interest. *Amunrud*, 158 Wn.2d at 219-20. As the state supreme court had done many times before in such cases, the Court applied rational basis. *Id.* at 221. The only mention of the unduly oppressive test arose in a terse response to the dissent, which would have applied the unduly oppressive test. *See id.* at 226. The majority simply noted that the rational basis test applied in non-fundamental liberty interest cases and said nothing of whether and when the unduly oppressive test might apply in other contexts. *See id. Amunrud* did not disrupt state due process law—it followed a long pattern of courts applying rational basis in liberty interest cases, leaving undisturbed the equally steady pattern of courts applying the unduly oppressive test in property cases.

The practice of citing to and applying the unduly oppressive test in both state and federal courts has continued without any confusion or concern since *Amunrud*. *See Laurel Park Community, LLC v. City of Tumwater*, 698 F.3d 1180, 1194-95 (9th Cir. 2012); *Abbey Road Group, LLC*, 167 Wn.2d at 260; *Klineburger v. Washington Dept. of Ecology*, 2018 WL 3853574, at *4-5 (Wn. App. Aug. 13, 2018) (unpublished opinion); *Johnson v. Washington Dept. of Fish & Wildlife*, 175 Wn. App. 765, 776-777 (2013); *Cradduck v. Yakima County.*, 166 Wn. App. 435, 441-43 (2012);[1] *Bayfield Resources Co. v. Western Washington Growth Management Hearings Bd.*, 158 Wn. App. 866, 887-88 (2010); *Olson v. Pierce County*, 2011 WL 302802, at *7 (Wn. App. Jan. 25, 2011) (unpublished decision); *Conner v. City of Seattle*, 153 Wn. App. 673, 700 (2009); *Young v. Kitsap County*, 2007 WL 365101, at *4-5 (Wn. App. Feb. 6, 2007) (unpublished decision).

Courts have used both the unduly oppressive test and the rational basis test during the same time periods without ever remarking on any confusion over which applies. The unduly oppressive test applies in the land-use context, and rational basis applies to non-fundamental liberty interests. Caselaw after *Amunrud* has expressly recognized that the rational basis test and the unduly oppressive test are both valid due-process tests, and that the unduly oppressive test is "most often

[1] In *Cradduck*, the Division II Court of Appeals cited to *Amunrud*, demonstrating that it did not abrogate the unduly oppressive test. *See Cradduck,* 166 Wn App. at 294.

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applied in land use cases." *Johnson v. Washington Dept. of Fish & Wildlife*, 175 Wn. App. at 767; *see also Seeley v. State*, 132 Wn.2d 776, 819-20 (1997) (acknowledging that "many of the applications of the [unduly oppressive test] pertain to concerns associated with the ownership and use of real property") (Sanders, J., dissenting).

Caselaw exhibits this pattern. Both the unduly oppressive test and the rational basis test have existed side-by-side and have been applied to different circumstances. The Washington Supreme Court has consistently turned to the unduly oppressive test to address substantive due process in land-use cases. *See, e.g.*, *Abbey Road Group, LLC*, 167 Wn.2d at 260; *Isla Verde Intern. Holdings, Inc. v. City of Camas*, 146 Wn.2d 740, 766 (2002); *Guimont v. Clarke*, 121 Wn.2d 586, 608 (1993); *Robinson v. City of Seattle*, 119 Wn.2d 34, 51 (1992); *Presbytery of Seattle v. King County*, 114 Wn.2d 320, 330 (1990). Over this same time period, the Washington Supreme Court and intermediate appellate courts turned to the rational basis test to address non-fundamental liberty interests outside the land-use context. *See, e.g.*, *Amunrud*, 158 Wn.2d at 219; *Meyers v. Newport Consol. Joint Sch. Dist. No. 56-415*, 31 Wn. App. 145, 150 (1982).

Few exceptions have arisen. In *Mission Springs v. City of Spokane*, a land-use case, the Court held that due process had been violated but did not articulate the test being applied. *See generally Mission Springs v. City of Spokane*, 134 Wn.2d 947 (1998). The dissent criticized the Court for this omission and would have applied the unduly oppressive test. *See id.* at 987-88 (Talmadge, J., dissenting). And in *Willoughby v. Department of Labor and Industries*, the Court applied the unduly oppressive test outside the land-use context, but the underlying claim involved a property deprivation (where the unduly oppressive test applies), rather than a non-fundamental liberty interest (where rational basis indisputably applies). *Willoughby v. Department of Labor & Industries of the State of Wash.*, 147 Wn.2d 725, 733 (2002). The City may also point to *Weden v. San Juan County*, a non-land-use case, but *Weden* declined to articulate a due-process test, expressly stating that the unduly oppressive test "simply does not apply to the present case." *Weden v. San Juan County*, 135 Wn.2d 678, 707 (1998).

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The Ninth Circuit, too, has applied the unduly oppressive test to a land-use due-process claim after *Amunrud*. *See Laurel Park Community, LLC*, 698 F.3d at 1193-95. That decision is binding on this Court, making certification doubly inappropriate because the Ninth Circuit has already determined which test applies. *See* Rebecca A. Cochran, *Federal Court Certification of Questions of State Law to State Courts: A Theoretical and Empirical Study*, 29 J. Legis. 157, 197-98 (2003). Both state court and federal court precedent provide all the information this Court needs to resolve Plaintiffs' state due-process claim.

The City's attempt to sow uncertainty amounts to little more than an attempt to change state law, which is not an appropriate basis for certification. *See Western Helicopter Services, Inc. v. Rogerson Aircraft Corp.*, 811 P.2d 627, 631 (Or. 1991) ("Although we always shall be willing to reconsider settled precedent of this court if circumstances warrant, we ordinarily shall not reconsider such precedent in a certified case."). Indeed, the City is pursuing the same change in state law on direct review in *Yim I* that it hopes to achieve here through certification. If the Washington Supreme Court decides to change state law, it will do so in *Yim I*; in the meantime, this Court must apply state law as it exists today.

III. Certification is disfavored when the moving party chose the federal forum and where First Amendment rights are at stake

Beyond a failure to meet the basic statutory criteria for certification, the Court should disfavor certification here for two additional reasons: the City elected to remove this case from state court and delay occasioned by certification will exacerbate Plaintiffs' First Amendment injury.

a. This Court should disfavor certification by federal defendants who elected the federal forum by removal from state court

The City faces a steeper burden because it chose this federal forum when the Plaintiffs were content to litigate their claims in state court. Where a defendant removes a case that began in state court, federal courts very sensibly frown upon an attempt to then shunt the case back into state court. *See National Bank of Washington v. Pearson*, 863 F.2d 322, 327 (4th Cir. 1988)

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("Certification would be inappropriate here, however, because Pearson himself removed this case from Maryland state court after the Maryland judge decided the question against him. If Pearson had wanted the Maryland Court of Appeals to rule on the matter, he should not have removed the action to federal court."); *Amer. Law Inst.*, Study of the Division of Jurisdiction Between State and Federal Courts, 296 (Official Draft 1969) ("[T]he courts should also be especially reluctant to certify at the instance of a defendant who has removed a case to federal court."); *cf. Doe v. City of Chicago*, 360 F.3d 667, 672 (7th Cir. 2004) ("And it's not a proper alternative to proceeding in the first instance in state court to sue in federal court but ask that the suit be stayed to permit certifying the interpretive issue to the state court, thus asking that the suit be split between two courts.").

The City selected a federal forum when it opted to remove the case to federal court from King County Superior Court. The state law question for which it now seeks certification was present when the lawsuit was filed in state court, yet the City chose a federal forum. Moreover, the City agreed to a stipulated summary judgment schedule for the complete and dispositive resolution of Plaintiffs' claims without any mention of an intent to certify a state-law question, and the City has now waited until the stipulated summary judgment briefing is complete to spring this motion to certify a state-law question in a case that is in federal court at the City's insistence.

The Washington Supreme Court's recent decision to grant review in a case raising a substantive due process claim does not impact the certification analysis. The City itself admits that the Washington Supreme Court may not even address the due process issue relevant here, leaving it unclear why the state supreme court case should affect certification. The City points to *Moore v. King County Fire Protection District No. 26*, 545 F.3d 761 (9th Cir. 2008), where the Ninth Circuit certified a question to the Washington Supreme Court in part because the state high court had already granted a case addressing the same issue. *Id.* at 763. *Moore* does not support certification here, however. First, the Ninth Circuit held that the state-law issue in *Moore* satisfied the statutory requirements that the question be determinative and uncertain. *See id.* As discussed above, the question here does not satisfy those criteria. Also, in *Moore* the pending state supreme court case was positioned to squarely address the dispositive issue in the federal case. *See id.* at 763. Here,

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however, the recently granted supreme court case might address any of five possible issues—any of which could be dispositive and only one of which raises the due-process question raised by the City here. *See* Exhibit 2. The City has waited to certify a state-law question that existed when this case began in state court. It has affirmed its desire to resolve this case before a federal court by removing the case and agreeing to dispositive summary judgment briefing. If a defendant can remove to federal court and then certify a state-law question to the high court, then a defendant could game the federal removal rules to leap to the state supreme court without even obtaining a trial court judgment. This Court should disfavor such tactics.

b. This Court should disfavor certification where First Amendment claims are at issue

This Court should deny the City's motion in order to safeguard First Amendment interests. Delay is always a concern with certification. *See Lehman Bros.*, 416 U.S. at 394 (Rehnquist, J., concurring) (Certification "entails more delay and expense than would an ordinary decision of the state question on the merits by the federal court."); *Kremer v. Cohen*, 325 F.3d 1035, 1044 (9th Cir. 2003) ("Certification also burdens litigants, forcing them to reargue the case in a different forum—a process that is costly and full of delay.") (Kozinski, J., dissenting). Such delay is especially troublesome where First Amendment rights are at stake because delay "may itself chill the First Amendment rights at issue." *Porter v. Jones*, 319 F.3d 483, 492-93 (9th Cir. 2003); *see also Zwickler v. Koota*, 389 U.S. 241, 252 (1967) (noting that "forc[ing] the plaintiff who has commenced a federal action to suffer the delay of state court proceedings might itself effect the impermissible chilling of the very constitutional right he seeks to protect"). For this reason, courts have held that *Pullman* abstention, which entails similar delay, is almost never allowed where a plaintiff has raised First Amendment claims. *Courthouse News Service v. Planet*, 750 F.3d 776, 784 (9th Cir. 2014). A similar concern arises with certification.

Here, the delay imposed by certification would be especially unjustified because Plaintiffs' First Amendment claim targets an entirely separate prohibition in the challenged law—the inquiry prohibition. At minimum, if this Court elects to certify the state-law due process question to state

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court, it should address the Plaintiffs' First Amendment claim while certification is pending. Given that certification would not satisfy the state statutory criteria, however, certification is not appropriate here.

CONCLUSION

The City has repeatedly affirmed its willingness to litigate all Plaintiffs' claims in federal court. This Court has all the tools it needs to competently address Plaintiffs' claims, and Washington's certification statute does not justify punting this case back to state court. The City's motion should be denied.

DATED: January 28, 2019.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on January 28, 2019, I caused the foregoing to be electronically filed with the Clerk of the Court using the CM/ECF, system which will send notification to all counsel of record.

Dated: January 28, 2019.

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